Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-733

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

vs.

ALBERT TYRONE ALLENSWORTH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Chief Appellate Attorney

TIMOTHY A. BAUGHMAN (P-24381)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5827

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TO THE SUPREME COURT OF

THE STATE OF MICHIGAN

Now Comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward R. Wilson, Chief Appellate Attorney, and Timothy A. Baughman, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on August 29, 1977.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals, Division I, is unreported, and is appended as Appendix "A". The Opinion of the Michigan Supreme Court is reported at ____Mich ____ (1977), ___NW2d____ (1977), and is appended as Appendix "B".

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered October 15, 1976. In lieu of granting Respondent's application for leave to appeal, the Michigan Supreme Court, via a per curium opinion with three of seven justices dissenting, entered an opinion reversing Respondent's conviction on August 29, 1977. The jurisdiction of this Court is invoked under 28 USC Sec. 1257(3).

QUESTION PRESENTED

Whether the Sixth Amendment to the United States Constitution forbids a trial judge from instructing in a proper case and without objection that an undisputed element of the offense charged has been established?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury ....

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Albert Tyrone Allensworth, Herbert Brown and Raymond Hicks were jointly tried on a charge of first degree felony murder in the Recorder's Court for the City of Detroit. Their case was tried to a jury, which returned a verdict of guilty as charged as to all three defendants.

The record of their trial reveals the following facts:

Dr. Gilbert Corrigan testified that he performed autopsies on bodies identified to him as William A. Thigpen, Jr. and Audrey L. Fields (R 410, 414). Both

people had died as a result of gunshot wounds to the brain inflicted at extremely close range (R 411-418).

Larry Kent testified that on the night of April 12-13, 1971 he was residing at 1415 Glenn (sic) Ct. in the City of Detroit (R 455). As of that date, the witness had known Herbert Brown for a couple of years or so; and identified him in court (R 456). He did not recall what time he arrived at the Glynn Ct. address on April 12, 1971; nor did he remember anyone coming to the apartment that evening (R 458). He admitted speaking to a Detroit police officer concerning two homicides which occurred at 2900 W. Boston in Detroit on April 13, 1971; that he gave a statement and signed it after reading it (458). The prosecutor asked him if he remembered telling the police that Mr. Brown, Mr. Allensworth and some others arrived at the Glynn Ct. address on the evening of April 12, 1971; and the witness replied that he didn't remember (R 461). He also denied telling the police that Herbert Brown and two others returned in the early morning hours of April 13, 1971 (R 463). He did not know Albert Allensworth or Raymond Hicks, but had heard of them (R 464). He did not remember telling the police that Brown, Hicks and Allensworth all arrived at the apartment that morning, or that the three of them divided up some money and other property among themselves (R 465-467). He did not remember giving testimony at the Preliminary Exam held less than two months previously to the effect that Mr. Brown, Mr. Allensworth and Mr. Hicks came to his apartment on April 13, 1971 and divided up money and some other property among themselves (R 469-475).

Charles Kenneth Dexter testified that that April 13, 1971 he was living in an apartment at 2900 W. Boston in Detroit with Audrey Fields (R 488). He had known William E. Thigpen, Jr. and Betty Harris since childhood

(R 489). He got reacquainted with Miss Harris at a bar in Detroit, and met Mr. Allensworth two weeks prior to April 13 (R 489-490). Both people had been to the witness's apartment twice before the 13th, and purchased cocaine from him (R 491-492). On the evening of April 12, the witness was at his apartment with Miss Fields when William Thigpen arrived in the early morning hours of April 1 (R 493). Thigpen brought a quantity of cocaine for the witness to purchase (R 495). Allensworth called the witness about 2:30 a.m. and asked if he could come over and purchase some cocaine (R 496-499). After agreeing on a price Allensworth told the witness he would be right over (R 499). Allensworth and Harris arrived together and the witness admitted them to the apartment (R 500). Allensworth and Harris sampled the cocaine, and indicated their satisfaction (R 501). As the two were leaving the witness opened the door and found several people pointing guns at him, among them a man he was virtually certain was Raymond Hicks (R 504-507). The witness saw Mr. Hicks in a line-up and recognized him, but did not "positively" identify him because of the serious nature of the offense involved (R 507). The witness told them to take the money, and Allensworth produced a gun, spun him around, and told him to "shut up", after which he patted him down (R 507-508). Allensworth pushed him into another room, and ordered him to lie on the floor (508). Hicks and the others led William Thigpen and Audrey Fields into the same room and Allensworth forced them to lie down (R 512). Allensworth stated he wanted "drugs", diamonds and money (R 512). The witness told them where the money was, and told them to take the cocaine that he had (R 512-513). After expressing his dissatisfaction with the "take", Allensworth ordered Audrey Fields out of the room, took her to the bedroom, and a shot was heard (R 531). Thigpen then began to protest saying "What's going on? I ain't got nothing to do with this", and begged them "Don't shoot me" to which Allensworth replied "Aw, shut up" and shot him in the head through a

pillow (R 513-514). As Allensworth stepped over Thigpen's body towards him, the witness said "Don't do this to me. I've got Four Thousand Dollars in the basement" (R 515). Allensworth said "You lying", put a pillow over the witness's head and shot (R 516). The witness received a grazing wound to the head, played dead, and waited for the people to leave (R 516-517). The witness locked the door and called the police (R 518). A police type revolver, two leather coats, the cocaine, money, and jewelry had been taken (R 518-521).

Betty Harris testified that she had known Charles Dexter all her life (R 622) and that she had known Allensworth and Brown prior to April 13, 1971 (R 622623). Allensworth was living with her at the time (R 626). She and Allensworth went to Mr. Dexter's apartment prior to April 13, 1971 to get some cocaine (R 627). On April 12, 1971 the witness was met by Allensworth at about 11:30 p.m. (R 630). They were picked up at her house by Herbert Brown and a woman known as Nita (R 632-633). The four people went to a bar and left about 2:00 a.m. on April 13 (R 635). They went to an apartment on Glynn Ct. (R 636). Two other men entered the apartment house at the same time and rode up on the elevator with them, one of whom she believed was Raymond Hicks (R 639640). The men went into a bedroom in the apartment for twenty minutes, when they emerged they told the two women "let's go" (R 640-641). The witness, Nita, Brown and Allensworth left in one car and the two men they met in the apartment left in another car (R 643). The cars proceeded to Lawton and W. Boston and parked (R 644). The witness and Allensworth crossed the street to mr. Dexter's apartment building (R 646). They were admitted to the apartment, she tested some cocaine which Allensworth paid Dexter for, and they prepared to leave (R 647-650). When Dexter opened the door, several armed men forced their way in, one of whom the witness believed to be Raymond Hicks (R 651). Allensworth then ordered the witness to leave, which she did (R 654-655). She ran down the street to a

parked car containing Brown and Nita (R 656). The three of them returned to the apartment on Glynn Ct. (R 657). The witness expressed her anxiety over the incident to Brown since Dexter knew her well, to which Brown replied that "they would only talk to God" (R 659-66)). After twenty minutes Allensworth, Hicks and another man entered the apartment, and while the witness and Nita sat in one room, the men went into a bedroom (R 661-662). After about twenty minutes the men emerged, and Hicks went to the bathroom and came out combing his hair (R 664). Hicks and his companion left, and Brown drove Allensworth and the witness home (R 665). She stated that as Brown emerged from the bedroom the the Glynn Ct. apartment before they left to go home he held up three fingers to her and Nita, and Nita explained that that meant they had killed three people (R 666-667). After going home, the witness asked Allensworth what had happened, and he told her to "listen to the radio" (R 668). They went and had breakfast together, and upon dropping her off afterwards, Allensworth asked her to keep some guns, a ring and a watch (R 671-673). The police arrived and searched her apartment, but did not discover the guns (R 674). After the police left, the witness and another man took the guns to another home where the man disposed of the guns by putting them in the furnace (R 675). The witness acknowledged that she had not divulged her story to the police when she was first questioned (R 680-681). She was placed in a line-up and identified, (R 681-683). The prosecutor asked the witness to describe the two gunmen who forced their way into Dexter's apartment, and she described both men, indicating Hicks in court as being one of them (R 686). She said her attention was drawn to him by his emergence from the bathroom on Glynn Ct. combing his hair (R 687). The witness had been charged with Murder First Degree and bound over for trial (R 688). She told the police about her story and testified agaisnt Brown, Hicks and Allensworth, and the charges against her were dropped; but she had not been promised anything before she told her story (R 689).

Fannie Mae Cartwright testified that on April 13, 1971 she was living directly below Mr. Dexter's apartment, and early in the morning she heard what she thought was ransacking going on upstairs, something being thrown down the incinerator, and people leaving the building (R 787-789).

Harold Smith was visiting with Miss Cartwright and heard gunfire (R 791-792).

Officer Andrew Parker testified to taking photographs of the apartment at 2900 W. Boston (R 797-810).

Officer Arthur Moore testified to going to the scene, and conveying Dexter and Thigpen to Ford Hospital (R 827-829).

Officer Robert Morgan spoke to Miss Cartwright and Mr. Smith, and retrieved a tin of suspected narcotics and marijuana cigarettes from the incinerator (R 834-836), which Charles Dexter later testified to throwing down the incinerator before the police arrived (R 861).

Officer Robert Taylor testified to interviewing Charles Dexter and Betty Harris in his capacity as officer in charge of the case (R 881-885).

Officer William Price arrested Hicks and Allensworth on April 28, 1971 (R 904).

Edward Jones stated that he disposed of the guns given to him by Mrs. Harris by putting them in a furnace (R 913). Allensworth later asked him what he had done with the guns, and the witness told him (R 922).

The People rested their case, and Brown and Allensworth rested without presenting any witnesses (R 1093-1094).

Nathan Bostic testified that on the evening of April 12 and the early morning hours of April 13, 1971 he was at Raymond Hicks' home (R 1095). He left around 1:30 a.m., and Raymond Hicks was there all the time that he was there (R 1096-1097).

Roosevelt Williams testified that about 1:00 a.m. on April 13, 1971 he was at Hicks' girlfriend's home with Hicks and some others (R 1103-1104). He stayed there there with Hicks for about three hours (R 1105).

Veronica Halston, Hicks' girlfriend, testified that Raymond Hicks was at her home in the early morning hours of April 13, 1971; and stayed with her throughout that day (R 1111).

Willie White's and Deborah Halston's testimony corroborated that of the other alibants (R 1118-1131), and Hicks rested his case (R 1131).

The Prosecutor presented closing argument on behalf of the People (R 1139-1198).

Defendant Brown's theory of the case as presented by his counsel, was that although Brown drove the people over to Dexter's apartment, he did not know that the robbery and the killings would occur (R 1206-1217).

Defendant Allensworth's attorney argued to the jury that Allensworth went to 2900 W. Boston to purchase drugs, and that Dexter was mistaken in his identification, or was deliberately "pinning" it on Allensworth (R 1219-1231). The other people there at the apartment were responsible for the robbery and the killings (R 1231).

Defendant Hicks' argument was that none of the witnesses had identified him (R 1235). He had in fact not been there when the crime was committed (R 1250).

The trial judge instructed the jury, in part, that:

> "Now, ordinarily, when I would be in the process of charging you, I would go into the matter of elements. And the elements, of course, are the variety of things which constitute the charge or make up the charge. Here, of course, it is charged there was a robbery, or an attempted robbery, and that in the process of executing this robbery, one William Thigpen was killed. Well, under the law, if there is such a robbery and a killing ensues, it is described in the law as Murder in the First Degree.
>
> Now, the reason I am not going into the elements of this case in great detail is because there is agreement here among all of the parties about the fact that there was a robbery or attempted robbery in the apartment of Charles Dexter at 2900 West Boston Boulevard, and that in the accomplishment or attempted accomplishment of the robbery William Thigpen was killed. I would say here, too, as an aside, that Audrey Fields was also killed. And the reason that evidence comes in is because it was part of what we call the res gestae, or the total happening, the total events at the time. And that is the reason that evidence was before you. But these men here are charged with the killing of William Thigpen.
>
> I instruct you you may accept as a matter of fact, and there need be no deliberation on your part with respect to it, Murder in the First Degree was committed in the killing of William Thigpen on April 13th, 1971, at 2900 West Boston Boulevard, City of Detroit.

> So, the principal fact in question to be decided by you is whether or not the defendants, Raymond Hicks, Herbert Brown and Albert Tyrone Allensworth, together, or in any combination, or one of them did in fact commit the unlawful killing." (R 1296-1297)

All counsel indicated satisfaction with the charge (R 1311).

The convictions were affirmed in People v Herbert Brown, 45 Mich App 505; 206 NW2d 730 (1973). A subsequent appeal by Respondent was permitted by the Michigan Court of Appeals, which affirmed in an unpublished opinion (Appendix "A"). The Michigan Supreme Court then reversed the conviction (Appendix "B").

REASONS FOR GRANTING THE WRIT

The question presented by Petitioner is a substantial Federal Constitutional issue about which there is disagreement among the Federal Circuits, and which this Court last addressed in Horning v District of Columbia, 254 US 135; 41 S Ct 53; 65 L Ed 185 (1920); further, the Michigan Supreme Court has decided the issue contrary to Horning v District of Columbia.

The Michigan Supreme Court held, following People v Reed, 393 Mich 342, 349; 224 NW2d 867 (1975), cert den, that a defendant has a constitutional right to a jury determination on all the elements of the offense charged. The Court quoted with approval United States v England, 347 F2d 425, 430 (CA 7, 1975), saying that:

> Once a plea of not guilty is entered, the defendant 'has an absolute right to a jury determination upon all essential elements

> of the offense. This right, emanating from the criminal defendant's constitutional right to a trial by jury is neither depleted nor diminished by what otherwise might be considered the conclusive or compelling nature of the evidence against him. . .[F]urthermore, in a situation wherein an understandingly tendered waiver is not forthcoming from the defendant under no circumstances may the trial court usurp this right by ruling as a matter of law on an essential element of the crime charged.' 393 Mich at 349; People v Allensworth at _____.

The court also held that when such an error occurs it can never be harmless error, for the "province of the jury" has been invaded. 393 Mich at 351; Allensworth at ____. The dissenting justices in the instant case agreed that there is no "absolute prohibition against removing from the jury consideration of any element of the offense, regardless of the evidence unless there is a stipulation by the defense." Allensworth at ____. Given that the charge was felony-murder, that the robbery and murder were undisputed, the issue being the identity of the culprits, and that there was no objection to the charge, the dissenters found no reason to reverse.

An analysis of the issue should begin with Horning v District of Columbia, 254 US 135; 41 S Ct 53; 65 L Ed 185 (1920). The trial judge over objection, informed the jury that there was really no issue of fact to decide, and that if the law permitted it, he would instruct the jury to return a verdict of guilty. He added that a failure to bring in a verdict of guilty could result only from flagrant disregard of the evidence, the law, and their obligation as jurors. This Court recognized that involved was not an issue of "the judge's expressing an opinion upon the evidence, as he would have had a right to do."

> The facts were not in dispute, and what he did was to say so, and to lay down the law applicable to them. In such a case obviously the function of the jury, if they do their duty, is little more than formal. The judge cannot direct a verdict, it is true; and the jury has the power to bring in a verdict in the teeth of both law and facts. But the judge law has the right and duty to tell them what the alw is upon this or that state of facts that may be found, and he can do the same none the less when the facts are agreed. If the facts are agreed, the judge may state that fact also; and when there is no dispute, he may say so, although there has been no formal agreement. Perhaps there was a regrettable peremptoriness of tone, but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts, and that is all that there was left for them after the defendant and his witnesses took the stand. 254 US at 138-139.

The trial judge in the instant case informed the jury that she would not go into the elements of the crime charged in detail because:

> There is an agreement here among all of the parties about the fact that there was a robbery or attempted robbery in the apartment of Carles Dexter at 2900 West Boston Boulevard, and that in the accomplishment or attempted accomplishment of the robbery William Thigpen was killed....
>
> I instruct you, you may accept as a matter of fact, and there need be no deliberation

> on your part with respect to it, Murder in the First Degree was committed in the killing of William Thigpen on April 13, 1971, at 2900 West Boston Boulevard, City of Detroit.
>
> So, the principal fact in question to be decided by you is whether or not the defendants, ... or one of them did in fact committ he unlawful killing.
> (CR 1296-1297)

Counsel expressed their satisfaction with the charge at its conclusion (R 1311). As in Horning v District of Columbia, the instruction does not present an issue of "the judge's expressing an opinion upon the evidence, as (s)he would have had a right to do"; rather, the question presented by the instruction is whether the Sixth Amendment right to trial by jury prohibits a trial judge from giving instructions to the jury which assume, as their basis, admitted or uncontroverted facts?

The issue has been considered a number of times by the federal circuit Courts of Appeals, and the resulting decisions reveal a disagreement in view. One of the earlier decisions is United States v Jonikas, 197 F2d 675 (CA 7, 1952). The charge was possessing and passing counterfeit bills, and the only fact in dispute was whether defendant knew the bills were counterfeit. The trial judge instructed the jury that possession and passing had been shown, and informed the jury:

> It narrows down to a question whether or not this man knew the money was counterfeit. In that connection you must consider all of the evidence, not just part of it — but all of it. 197 F2d at 677.

The instruction was raised as error, and the Seventh Circuit held that "It is not ... reversible error for the court in its instruction to assume the existence of facts,

the existence of which is undisputed or proved beyond controversy." 197 F2d at 679.

The Sixth Circuit case of United States v Malone, 238 F2d 851 (CA 6, 1956) is most closely analogous to the instant case in the manner in which the instruction was given:

> ...there isn't any question here, as counsel has argued all around, there was here a robbery. Your ultimate question is going to be whether or not the Government of the United States has here proved a case against these four men. But there isn't any question here but what the elements of the offense as I defined have been met... Now we come to the other element ...there isn't any question but in the use of weapons pointed at people that the lives of the people in the bank were put in jeopardy. So the elements of the offense were present and I so charge you (emphasis added). 238 F2d at 852.

The conclusion reached by the Sixth Circuit was in accord with that reached by the Seventh Circuit: "When a fact is not made an issue by defendant and it is shown without controversy by the evidence, the trial judge does not commit reversible error in stating that fact to the jury." 238 F2d at 852.

Perhaps the most frequently cited case is Lyons v United States, 325 F2d 370 (CA 9, 1963), where the charge was that defendant had caused two petitioners in bankruptcy to falsely state in their petitions to bankruptcy court that they had paid no money to an attorney at law in connection with the bankruptcy proceedings. The trial judge instructed the jury that the person to whom money was paid was an attorney at

law. The Ninth Circuit observed that though it is prejudicially erroneous to give an instruction assuming a fact which is in issue, "an instruction, such as the one given here, which assumes an admitted or uncontroverted fact, is not reversible error." 325 F2d at 375.

Further support for the principle that an instruction which assumes uncontroverted facts does not offend the Sixth Amendment may be seen in United States v Ugarte Veizaga, 420 F2d 677 (CA 5, 1970), where, in case involving a charge of importation of cocaine, an instruction that the defendant had in fact imported cocaine was held proper where the defendant admitted as much in his testimony. In Verdugo v United States, 402 F2d 599 (CA 9, 1968) the trial court's instruction that heroin is a narcotic drug was upheld. See also, United States v Terry, 446 F2d 579 (CA 9, 1971); Nordgren v United States, 181 F2d 718 (CA 9, 1950); United States v Mura, 191 F2d 866 (CA 2, 1951); Olar v United States, 391 F2d 773 (CA 9, 1968).

The lead case in opposition to the line of authority discussed above is United States v England, supra, on which the Michigan Supreme Court relied. As noted supra, in England, the Seventh Circuit, with one judge dissenting, held that a defendant has a constitutional right to have all elements of the crime submitted to the jury even where the particular element in traditional terms is uncontroverted or not put in issue. The Court found the cases to the contrary to be distinguishable or "improvident." 347 F2d at 435. It is interesting to note, however, that several of the cases cited by the majority in England state their holding in the following manner: "No matter how conclusive the evidence may be in a criminal case on a controverted material fact, the trial judge cannot make the finding or withdraw the issue from the jury." (emphasis added) United States v McKenzie, 301 F2d 880, 882 (CA 6, 1962); also Schwachter v United States, 237 F2d 640, 644 (CA 6, 1956), both quoted in England.

Petitioner submits that the Sixth Amendment does not prohibit a trial judge from giving instructions which assume uncontroverted facts, particularly where there is no objection to the instructions given.[1] There being disagreement among the circuits, and the instant case (and United States v England) appearing to be contrary to Horning v District of Columbia, supra, Petitioner submits that an issue is presented which requires plenary review by this Court.

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1. There is indeed a line of authority in Michigan that where there are no disputed facts a judge may instruct a jury that it is the jury's duty to return a verdict of guilty. People v Gardner, 143 Mich 104, 106 NW 541; People v Minney, 155 Mich 534, 119 NW 918; People v Gordon, 156 Mich 237, 120 NW 578; People v Flemming, 221 Mich 609, 192 NW 625; People v Pericino, 227 Mich 440, 198 NW 902; People v Murphy, 239 Mich 60, 214 NW 165.

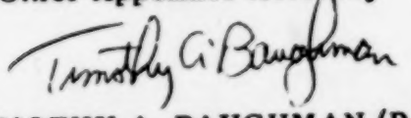
CONCLUSION

It is respectfully submitted that for the reasons outlined above Petitioner's request for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Chief Appellate Attorney



TIMOTHY A. BAUGHMAN (P-24381)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5827

TAB:do

Dated: September 29, 1977.

APPENDIX A

OPINION OF THE MICHIGAN COURT OF APPEALS, DIVISION I

(People of the State of Michigan v Albert Tyrone Allensworth)

(No. 24154)

(Filed October 15, 1976)

Before: Michael J. Kelly, P.J., N.J. Kaufman and R.H. Campbell, JJ.

Per Curiam

Defendant, along with two others, was convicted by a jury of the felony murder of William Thigpen, Jr. on July 16, 1971. His conviction was affirmed by this court in People v Herbert Brown; Allensworth; Hicks, 45 Mich App 505, 206 NW 2d 730 (1973). Defendant filed a delayed appeal raising an issue neither argued nor briefed in his appeal by right. Defendant is here by leave of this court.

The sole issue on appeal is whether the trial court reversibly erred in instructing the jury that William Thigpen, Jr. died during the perpetration, or attempted perpetration of a robbery and that first degree felony murder as a matter of law had been proved. There was no objection to this instruction.

On April 13, 1971, police arrived at 2900 W. Boston to find Mr. Charles Dexter, who had called them, with a superficial gunshot wound to the head. In the rear of the apartment Thigpen was lying face up with a single bullet wound behind his right ear. He died several hours alter. Another person, Audrey Fields, was found in a bedroom fatally wounded by a single shot to the head. No weapon was ever found. The police officers testified that the apartment appeared to have been ransacked and photographs of the disheveled

apartment were admitted into evidence.

Dexter, the chief prosecution witness, testified that the defendant entered his apartment with a woman in order to purchase cocaine. While leaving, three other men with guns drawn, burst into the apartment. Dexter stated that the defendant pulled his gun and demanded money, drugs and other valuables. Dexter testified that Allensworth took Fields from the den to the bedroom and that he heard one shot but did not know who killed her. Dexter stated that Allensworth returned to the den and shot Thigpen. Dexter then testified that he was shot by Allensworth. Drugs, jewelry and clothing were taken.

It was uncontroverted that a robbery and killing occurred. Allensworth's defense was that he was there but fled when the three men entered the apartment. Through counsel, defendant claimed he did not kill Thigpen and that Dexter was not worthy of belief.

The Supreme Court in People v Reed, 393 Mich 342, 224 NW 2d 879 (1973), considered an instruction which was objected to and which stated, as a matter of law, that a premeditated murder had been proven by the prosecution. In condemning the instruction as an invasion of the province of the jury, the court stated:

> "Once a plea of not guilty is entered, the defendant 'has an absolute right to a jury determination upon all essential elements of the offense. This right, emanating from the criminal defendant's constitutional right to a trial by jury, is neither depleted nor diminished by what otherwise might be considered the conclusive or compelling nature of the evidence against him. * * * (F)urthermore, in a situation wherein an understandingly tendered waiver is not forthcoming from the defendant, under no circumstances may the trial court usurp this right by

> ruling as a matter of law on an essential element of the crime charged.' United States v England, 347 F2d, 425, 430 (CA 7, 1965). (Footnote omitted.)" Supra, at 349.

The court held that the presentation of uncontroverted evidence of the crime did not always mean that the jury would find that a crime had been committed. As such, the trial court reversibly erred in making the finding of fact that first degree murder had occurred.

Several factors distinguish Reed, supra, from the case at bar. Foremost, no objection was raised at the trial and the issue was neither argued nor briefed in defendant's first appeal. Allegations of error are to be brought to the trial court's attention and not raised for the first time on appeal.

Recently, the Supreme Court reaffirmed this long standing rule that the failure to object precludes appellate consideration of the issue. See People v Alcala, 396 Mich 99, 237 NW2d 475 (1976), People v Hall, 396 Mich 650, ___ NW2d ___ (1976), People v Moss, 497 Mich 59, ___ NW2d ___ (1976). The examination must focus on whether the error resulted in manifest injustice. People v Carroll, 396 Mich 408, ___ NW2d ___ (1976).

While the concept of manifest injustice provides a relatively undefined standard with which to evaluate this error, the primary question is whether the defendant was accorded a fair and impartial trial, and error notwithstanding. People v Elliott, 322 Mich 313, 33 NW2d 811 (1948); People v Brott, 163 Mich 150, 128 NW 236 (1910). In considering whether the defendant had a fair trial, it must be noted that the trial court apparently did not give the elements of the charged crime because of an apparent agreement among the

parties. The trial court stated, while giving the complained of instruction:

> "Now, the reason I am not going into the elements of this case in great detail is because there is agreement here among all of the parties about the fact that there was a robbery or attempted robbery in the apartment of Charles Dexter at 2900 West Boston Boulevard, and that in the accomplishments or attempted accomplishment of the robbery William Thigpen was killed." (Emphasis added).

It is of crucial importance to note that there was no objection to the statement that there was agreement that the crime had been committed. At the close of the instructions, satisfaction was expressed by counsel. This court has consistently refused to allow one to create error and then, on appeal, complain of its existence. People v Collins, 63 Mich App 376, 234 NW2d 531 (1975). Where the defense counsel assents to the failure to give an instruction on malice in a felony murder prosecution, the defendant cannot later complain on appeal. Hall, supra, p 657. Defendant's approval of the instruction given, conceding that the crime occurred, undermines his challenge now.

We have reviewed the record carefully. The three defendants presented consistent defenses that they did not commit the crime. The defendant explored and attacked the credibility of the prosecution's key witness. In this nine day jury trial, defendant was afforded a fair and impartial hearing. His approval of the instruction, failure to object and the failure to raise the issue on his first appeal indicates that there was no quarrel with the conclusion that the crime had been committed. The jury was instructed that guilt was to be proven beyond a reasonable doubt. Evidence amply supported the conviction and there was no manifest injustice.

Affirmed.

APPENDIX B

OPINION OF THE MICHIGAN SUPREME COURT

(People of the State of Michigan v Albert Tyrone Allensworth)

(No.59228)

(Filed August 29, 1977)

Before The Entire Bench

Per Curiam. A jury convicted defendant and two others of the 1971 first-degree felony murder of William Thigpen, Jr., in the City of Detroit. After the Court of Appeals affirmed defendant's conviction in People v Herbert Brown, 45 Mich App 505; 206 NW2d 730 (1973), defendant asked the Court to consider by a delayed appeal the issue whether the trial court reversibly erred in instructing the jury that the parties had agreed that the victim died during the perpetration, or attempted perpetration, of a robbery and that first-degree felony murder as a matter of law had been proved. The Court of Appeals held in an unpublished per curiam opinion dated October 15, 1976 that defendant's failure to object to this instruction at trial was fatal to his argument on appeal. We disagree.

Charles Dexter testified that defendant and a woman entered his apartment at 9000 West Boston Boulevard to purchase cocaine. While defendant was leaving, three other men burst into the apartment with guns drawn. Defendant then pulled a gun and demanded money, drugs, jewelry, and other valuables. Dexter testified that during the course of this incident he witnessed defendant fire the single shot that killed Thigpen.

In final argument, defense counsel contended that defendant fled from Dexter's apartment when the three men entered, that his client did not kill Thigpen and that Dexter, an admitted dope dealer, was not worthy of belief.

During the course of her jury instructions, the trial judge informed the jury that she was not going into the elements of the crime charged in detail because:

> "[T]here is agreement here among all of the parties about the fact that there was a robbery or attempted robbery in the apartment of Charles Dexter at 2900 West Boston Boulevard, and that in the accomplishment or attempted accomplishment of the robbery William Thigpen was killed. * * *
>
> "I instruct you, you may accept as a matter of fact, and there need be no deliberation on your part with respect to it, Murder in the First Degree was committed in the killing of William Thigpen on April 13th, 1971, at 2900 West Boston Boulevard, City of Detroit.
>
> "So, the principal fact in question to be decided by you is whether or not the defendants, * * * or one of them did in fact commit the unlawful killing."

Defendant here complains that this unobjected-to instruction impermissibly removes from the jury's consideration the element of robbery or attempted robbery.

In People v Reed, 393 Mich 342, 349; 224 NW2d 867 (1975), we attested to our belief that the right of the jury to determine all elements of the offense is fundamental:

> "Once a plea of not guilty is entered, the defendant 'has an absolute right to a jury determination upon all essential elements of the offense. * * * [F]urthermore, in a situation wherein an understandingly tendered waiver is not forthcoming from the defendant, under no circumstances may the trial court usurp this

> right by ruling as a matter of law on an essential element of the crime charged.' United States v England, 347 F2d 425, 430 (CA 7, 1965)" (emphasis added).

Although the defendant in Reed did lodge an objection to the instruction, that objection was not critical. As the foregoing quotation reveals our emphasis was on the trial judge's responsibility in charging. In saying that the instruction to the jury must include all elements of the crime charged, we relied upon People v Liggett, 378 Mich 706, 714; 148 NW2d 784 (1967), which discussed the trial judge's responsibility for instructions "even in the absence of request." Here we have at most an implied waiver and not "an understandingly tendered waiver" from the defendant.

Reed, too, answers the prosecutor's argument that the harmless error rule should apply. The Court said:

> "We find that the right of the jury to determine all elements of an offense is so fundamental a right that hte harmless error rule is not appropiate where the judge invades that province. There is a difference between commenting on the evidence and making a finding of fact for the jury. When the trial judge, as in the instant case, instructs that an essential element of a ciminal offense exists, as a matter of law, we element of a criminal offense exists, as a matter of law, we will find reversible error." 393 Mich at 351 (emphasis added).

The instant trial judge's instruction removed the element of the felony and the element of death from the jury's consideration. She said there was an "agreement" that a robbery or attempted robbery had occurred and Thigpen had been killed as a result of it. There was no agreement.

Pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse the Court of Appeals and remand the case to the Recorder's Court for the City of Detroit for a new trial.

M. S. Coleman, J. (Dissent)

There are at least four reasons why I do not agree with the per curiam opinion:

1. The pivotal issue was not preserved at trial.

2. The issue was neither briefed nor argued when the matter was appealed to the Court of Appeals in 1973 and conviction was affirmed.[1]

3. The opinion is based upon the full retroactivity of our decision in People v Reed, 393 Mich 342; 224 NW2d 867 (1975).

4. Regardless of retroactivity, the facts of this case are unlike those of Reed in important part.

I.

On April 13, 1971, two persons were killed by bullet wounds to the head. A third, Charles Dexter, whose afro hairstyle may have saved him, suffered a gunshot crease in the head, but he lived. All were in a ransacked apartment where the police found no weapons.

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[1] People v Brown, Hicks and Allensworth, 45 Mich App 505; 206 NW2d 730 (1973). There was no appeal to this Court.

Dexter testified that defendant entered his apartment with a woman, ostensibly to purchase cocaine. Three other men then entered the apartment with guns drawn. Defendant then pulled a gun and demanded money, drugs, jewelry and other valuables. Allensworth took one Audrey Fields to the bedroom and Dexter heard one shot. The woman later was found to be dead. Allensworth returned to the others, killed William Thigpen, Jr. and shot Dexter.

Allensworth's girlfriend testified that when the three armed assailants rushed in, Allensworth shoved her out of the apartment and told her to flee. She went to an apartment where Allensworth and the three said assailants joined her to divide the loot.

Defendant's defense was alibi. He said he left the apartment of Charles Dexter when the three other men burst in, that he did not engage in the robbery or kill William Thigpen, Jr. and that Charles Dexter was not a credible witness.

There was no dispute of fact excepting that defendant claimed not to have been present when the robbery and killings occurred.

Dates are of some importance to the analysis of this case:

1. On July 16, 1971 defendant was convicted.

2. On March 26, 1973 the Court of Appeals affirmed.

3. Reed was convicted March 21, 1972 (over 8 months after Allensworth) and the conviction was affirmed August 30, 1973, 5 months after Allensworth's conviction was affirmed.

4. The Reed conviction was reversed by this Court on January 21, 1975.

5. Allensworth's delayed motion for a new trial was filed on January 29, 1975, about 1-1/2 years after the Court of Appeals had affirmed his conviction. The motion was denied April 7, 1975.

6. On May 1, 1975 defendant filed an application for leave to appeal denial of the motion. Leave was granted and the conviction was affirmed on October 15, 1976 by the Court of Appeals.

The issue is whether the trial judge erred in instructing the jury that a murder in the first degree (felony murder) had been committed and that the "principal fact in question to be decided" was whether Allensworth did in fact commit the killings.

I.

No objection to the instruction was made in the trial court nor was the issue thereafter raised on appeal. Only after the Reed decision, about 1-1/2 years after appeal, was the matter raised. In short, the issue had not been preserved so as to be in the "pipeline" but was newly created after our Reed decision.

In a general sense, our jurisprudence requires a process which can anitcipate finality without doing injury to the reality of "justice".

Appeal as of right brings mandatory collegial scrutiny to the trial court proceedings. Further appeal is available by grant of leave upon application to this Court. If the defendant does not raise an issue either at

trial or on appeal, the courts do not usually err in failing to consider it. As here, there may be no recognizable issue until our Court creates one at a later date.

The question then becomes whether all persons who might have raised a similar issue can claim it, absent preservation, regardless of the period intervening between timely appeal and a subsequent decision of the Court in another unrelated case. Although there must be an exception to provide for fundamentals necessary to justice, the orderly process of law suggests a beginning and an ending.

Perceiving no injustice to defendant in this case nor any instrusion upon the goal of a fair process, I agree with the Court of Appeals that the failure to preserve the issue precludes a tardy resurrection.

II.

Despite the question of retroactivity, there is a fundamental difference between the facts of Reed and the facts of this case. Defendant Reed was charged with first-degree murder requiring the elements of premeditation and intent. The trial judge concluded that the murder was of the first degree because the two victims' wrists and legs were bound and tied together in such ways and the killings effected in such ways as to make premeditation and intent obvious. The only question was whether Reed was the killer. Reed objected to the instruction which took from the jury the findings of premeditation and intent. This Court found that the judge could not take from the jury the duty of

determining whether those requisite elements were present.[2]

Here we have a felony-murder. A killing in the course of the commission of a felony is all that need be found to establish the offense of murder in the first degree (no premeditation, no intent need be found). The prosecutor presented a sound case and there was no dispute of the robbery and the killing. There was no evidence to the contrary which the jury properly could consider the defense was simply that defendant was not there. There was no objection. Indeed, until our Reed decision, trial and appellate counsel apparently saw no cause to object, no injustice to defendant.

By its words, Reed did not lay down an absolute prohibition against removing from the jury consideration of any element of the offense, regardless of the evidence unless there is a stipulation by the defense. I would not place form over substance.

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2 The trial judge in Reed had charged that it was undisputed that first-degree murder had been committed. The Reed Court demurred thusly:

"Such an instruction is patently wrong. The presence of two dead bodies alone cannot reveal the state of mind of the killer nor the full circumstances of the killing. Without such additional evidence it is impossible to know what degree of homicide was committed.

"Obviously it cannot be presupposed, as the instruction did, that first-degree murder was involved for two reasons. First, it cannot logically be presumed that the killer had the necessary premeditation and intent. This would require proof beyond the existence and condition of the dead bodies. Second, it cannot legally he presumed for the reason that the necessary premeditation and intent are elements of the crime the prosecution must prove. . . ."

As the elements of the offense were clear and undisputed at trial and no objection raised then or upon timely appeal, we should not allow dispute to be claimed in a second appeal 6 years later.[3]

I would affirm.

/s/ Mary S. Coleman

/s/ Blair Moody, Jr.

I concur in the view that the defendant's conviction should be affirmed but my reasons therefore are limited to those advanced in Part II of Justice Coleman's opinion.

/s/ James L. Ryan

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3 See People v Alcala, 396 Mich 99; 237 NW2d 475 (1976), and People v Moss, 397 Mich 69; 243 NW2d 254 (1976).